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5 BEFORE THE
6 DIVISION OF MEDICAL QUALITY
7 MEDICAL BOARD OF CALIFORNIA
8 DEPARTMENT OF CONSUMER AFFAIRS
9 STATE OF CALIFORNIA

9 In the Matter of the Petition for) OAH No. L-9509065
10 Reinstatement of Revoked Certificate) File No. 04-95-54251
11 MICHAEL ELAM)
12 _____)

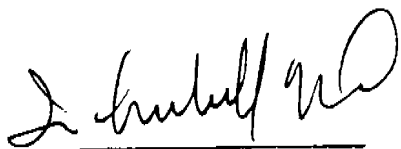
13 MODIFICATION OF DECISION AND ORDER

14 The attached Stipulation of the parties to modify the
15 Decision and Order of the Division of Medical Quality is adopted
16 by the Division of Medical Quality of the Medical Board of
17 California, Department of Consumer Affairs, State of California,
18 as its Modification of Decision and Order in the above-entitled
19 matter.

20 This Modification of Decision and Order shall become
21 effective immediately, and the Stay of Execution formerly issued
22 herein is vacated.

23 DATED February 1, 1996.

24 DIVISION OF MEDICAL QUALITY
25 MEDICAL BOARD OF CALIFORNIA

26 
27 _____
28 IRA LUBELL, M.D. CHAIR
PANEL A

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of the State of California
2 M. Gayle Askren,
Deputy Attorney General
3 California Department of Justice
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6 Attorneys for Complainant

7
8 BEFORE THE
DIVISION OF MEDICAL QUALITY
9 MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
10 STATE OF CALIFORNIA

11 In the Matter of the Petition for) Case No. 04-95-54251
Reinstatement of Revoked Certificate)
12) STIPULATION OF THE
MICHAEL ELAM) PARTIES TO MODIFICATION
13) OF DECISION AND ORDER
Petitioner.)
14)

15 COME NOW THE PARTIES HERETO and enter into the within
16 Stipulation. The Office of the Attorney General of California is
17 represented by M. Gayle Askren, Deputy Attorney General.
18 Petitioner Michael Elam, M.D. is represented by counsel Richard
19 K. Turner, Esq. The within Stipulation is made specifically for
20 submission to, and approval of, the Division of Medical Quality
21 in the above-captioned matter.

22 IT IS STIPULATED AS FOLLOWS:

23 1. The Decision and Order of the Division of Medical
24 Quality in File No. 04-95-54251, OAH No. L-9509065, shall be
25 modified to provide two additional conditions of probation, which
26 may be numbered 13 and 14.

27 2. Conditions 13 and 14 shall be deemed inserted by
28 interlineation on page 11 of the Decision and Order dated

1 December 21, 1995, following the end of condition 12.

2 3. Conditions 13 and 14 shall be enforceable in the
3 same manner as the other conditions of probation established
4 therein.

5 4. Condition 13 shall provide, and shall read as
6 follows:

7 "13. Petitioner shall observe a minimum of 10
8 surgeries in his specialty, all of which shall be
9 performed by board-certified surgeons in his specialty,
10 during the period February 1 through and including
11 February 29, 1996. The particular nature of the
12 surgeries shall encompass the entire range of all the
13 surgical procedures intended to be performed by
14 Petitioner. Proof of compliance acceptable to the
15 Division of Medical Quality or its designee shall be
16 furnished by Petitioner before Petitioner is permitted
17 to perform surgery pursuant to condition 14, *post*."

18 5. Condition 14 shall provide, and shall read as
19 follows:

20 "14. Upon successful compliance with the terms
21 and length of the observation period, condition 13,
22 *ante*, Petitioner shall have a proctor/monitor for his
23 first 10 surgeries. All proctors/monitors shall file
24 reports with the Division of Medical Quality or its
25 designee for its review."


26 6. Upon approval by the Division of Medical Quality
27 of the within Stipulation, any stay of execution granted by the

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1 Division for the purpose of consideration of this Stipulation
2 shall be vacated immediately.

4 IT IS SO STIPULATED.

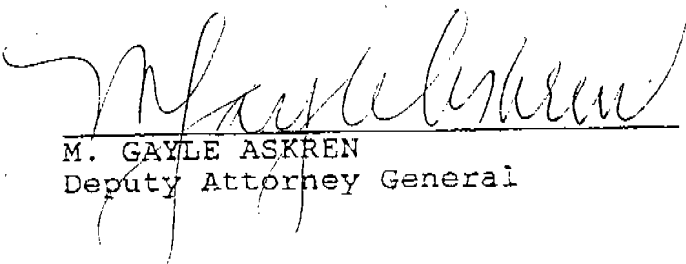
6 DATED 1.20.96


RICHARD K. TURNER, ESQ.
Attorney at Law
For Petitioner Michael Elam, M.D.

10 DATED 1/22/96


MICHAEL ELAM, M.D.
Petitioner

14 DATED 1/23/96


M. GAYLE ASKREN
Deputy Attorney General

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petitiotn for Reinstatement)
Against:)

) File No. 04-95-54251

MICHAEL V. ELAM, M.D.)
2007 Seadrift Drive)
Corona del Mar, CA 92625)

) OAH No. L-9509065

Physician's and Surgeon's)
Certificate # C-38533)
_____)

ORDER GRANTING STAY ORDER

Complainant has filed a request for a stay of execution of the Decision with an effective date of January 22, 1996.

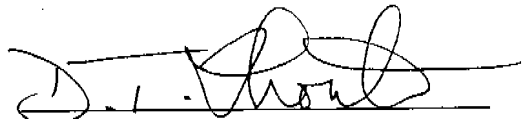
Execution is stayed until February 21, 1996.

This Stay is granted solely for the purpose to allow time for the Agency to review and act on the Petition For Reconsideration.

Dated: January 19, 1996

DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA

By:



Dave T. Thornton
Supervising Investigator II

**BEFORE THE DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Petition For
Reinstatement of Revoked Certificate**

MICHAEL ELAM

Respondent.

OAH No. L-9509065

File No: 04-95-54251


DECISION AND ORDER

The attached Proposed Decision is adopted by the Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs, State of California, as its Decision in the above-entitled matter.

This Decision shall become effective on January 22, 1996.

DATED December 21, 1995.

**DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA**



Ira Lubell, M.D.

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DIVISION OF MEDICAL QUALITY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition For)	
Reinstatement of Revoked Certificate)	OAH No. L-9509065
)	
Michael Elam)	
)	
Petitioner.)	
)	
)	

PROPOSED DECISION

On October 16, 1995, in San Diego, California, Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

M. Gayle Askren, Deputy Attorney General, represented the California Attorney General's Office.

Richard K. Turner, Attorney at Law, represented Michael V. Elam, M.D.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

On or about December 19, 1994 petitioner signed a Petition for Reinstatement of Revoked Certificate. The effective date that discipline began was September 6, 1990. This disciplinary matter followed a long and winding road of administrative mandate, partial granting Remand of Mandate to the Board, remand to the Administrative Law Judge, Proposed Decision Following Remand and final Adoption of the Proposed Order Following Remand.

When the dust cleared after all the twists and turns of the process of review both in the Superior Court and the Medical Board of California petitioner remained a former physician who has not practiced medicine since September, 1990.

II

Petitioner's license was revoked for multiple acts of gross negligence involving dishonesty in falsifying medical records and insurance claims with respect to one patient and failing to secure a legitimate, arms length informed consent with respect to a second patient. Petitioner engaged in a not uncommon (although dishonest and deplorable) practice of performing elective plastic surgery on patients (which were not covered by the patients insurance) and billing the insurance company for medically necessary procedures (which were covered).

Petitioner's administrative trial took place in 1989 and 1990. It was a consolidated action involving petitioner and his partner Frederick Berkowitz, M.D. Dr. Berkowitz was found guilty of substantially all of the same charges of dishonesty as was found against petitioner. However, his revocation was stayed and he was suspended from practice for six months.

Petitioner's conduct both as a physician and at the trial was scathingly criticized by the administrative law judge. The findings in the original proposed decision were directed not only to his violation of the standard of care but also to the character of the petitioner and his lack of contrition and remorse. She found him at the time of the revocation to be profoundly lacking in insight, empathy or shame. The revocation of petitioner's license was required because there was absolutely no acknowledgment at trial of the gravity of the harm done or the responsibility for it.

III

Revocation of a physician's license does interesting things to people. Some find another profession, all the while denying any wrongdoing and blaming the system for their misfortune. Some attempt re-licensure without changing their attitude or their style of practice, believing that the passage of time is all they must endure. Others do the best they can with what they have, although sometimes that's not enough.

Still others start out kicking and screaming about the injustice of their revocation and slowly come to understand that they are far less important than the profession they were once a member of. Of all the possibilities regarding Michael Elam, this appears, from the record before the Administrative Law Judge, to be the most likely.

IV

The statute which authorizes this proceeding (Business and Professions Code section 2307) mandates minimum time requirements for reinstatement. For a certificate revoked for

unprofessional conduct (as was the case with Dr. Elam) the waiting period is three years. This issue is interesting because Dr. Elam has not practiced for over five years (since the original proposed decision was adopted by the Board) although he continued to legally challenge the decision in the Superior Court (which found in his favor on some points and remanded it to the Board). The final decision following remand became effective on July 14, 1993.

One of the questions for the trier of fact is whether one can establish rehabilitation while still challenging the Board's decision. The simple answer is it depends. It depends on the totality of the record that is considered. One can most certainly acknowledge wrongdoing or responsibility and still contest the severity of the sanction imposed or dispute some of the findings of the trial judge. Or, by contesting the original decision one could simply be fulfilling the prophecy of the trial judge of being devoid of insight, empathy and remorse, a clueless acting out of the character flaw identified by the trial judge.

It is a dangerous and unwise exercise to focus solely on the fact that petitioner chose to contest the original decision adopted by the Board. It is inappropriate to draw any inference either positive or negative from the sole fact that petitioner chose to exercise rights accorded by the constitution and the law of this state.

V

Petitioner is 47 years old and resides in Orange County with his wife and three children. He received his medical degree from Louisiana State University Medical School in 1974. He did internship and residency in Louisiana and in 1979 he moved to California at the invitation of Dr. Frederick Berkowitz. In 1978 he first secured licensure in California as a physician. In 1979 he became Board certified in otolaryngology. In 1980 he became Dr. Berkowitz' partner and remained in this partnership until 1987. After the partnership was dissolved petitioner was in private practice in Newport Beach, California until his revocation.

Dr. Elam became what can be described as a "celebrity doctor" a doctor whose persona transcended the traditional picture of the caregiver. He became the plastic surgeon to the stars and his name and picture and story were more likely to be seen in People magazine or the society column than a medical journal. He became wealthy, successful, sought after, praised. He became, in turn cocky, arrogant and grandiose. He became the antithesis of the good and caring physician. He came to believe that he was more important than the care he gave. He began to believe the power of his skill and personality were the gift he was giving to his patients. He was seduced by his own ego to

believe in the illusion of his magical healing power. Corollary to that was his grandiose belief that he was above criticism.

This attitude of hubris carried over into the administrative trial and was the crucial factor relied upon by the trial judge in revoking his certificate outright. Petitioner gave the trial judge no other alternative based upon his conduct at trial.

VI

The notion of rehabilitation is a fundamental part of our jurisprudence and our culture. Giving people a fresh start and not punishing in perpetuity is a basic tenet of the Judeo-Christian ethic that suffuses much of our notions of law and punishment. However, people must earn their second chance. The criminal law erroneously relied on the passage of time incarcerated to teach criminals a lesson. Recidivism rates have demonstrated the lack of success focusing solely on the passage of time.

The administrative disciplinary process in California is far more successful (although far from perfect) in assessing rehabilitation of licensees who have been disciplined for various acts of professional misconduct. The mere passage of time is not in and of itself proof of rehabilitation. The burden rests squarely on the petitioner to present evidence that is persuasive. The Board relies on Administrative Law Judges who are specialists within the Office of Administrative Hearings and appointed to the Medical Quality Hearing Panel pursuant to Government Code section 11371 to hear these matters and make informed recommendations to the Board. Business and Professions Code section 2307 gives the Board through the ALJ broad discretion to tailor the granting of reinstatement with terms and conditions deemed necessary to protect the public and insure the doctor a safe, comfortable and medically appropriate transition back to mainstream practice.

Furthermore, section 2307 specifically enumerates a non exhaustive set of factors that the ALJ may consider. The legislature clearly intended that close scrutiny be given to claims for reinstatement of revoked certificate. The ALJ should inquire into, among other things, "all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioners rehabilitative efforts, general reputation for truth, and professional ability." In all such reviews the ALJ must be guided in his or her recommendations by the unambiguous statement of public policy contained in Business and Professions Code section 2229.

Section 2229 (a) states clearly that protection of the public "shall have the highest priority. . . for the administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority."

Subparagraph (b) of section 2229 recognizes the appropriateness of rehabilitation of physicians by stating "In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel shall, wherever possible, (emphasis added) take action that is calculated to aid in the rehabilitation(emphasis added) of the licensee. . ."

Of crucial significance is subparagraph (c) of section 2229 which acknowledges that the administrative law judge must balance protection of the public with the policy of wherever possible fostering the rehabilitation of licensees. Only where rehabilitation and protection of the public are inconsistent should the administrative law judge recommend denial of the petition outright.

There is no doubt that some revoked physicians seeking restoration of their license are not satisfactory candidates for re-licensure. They are like the proverbial two percent seen in basic training in the army who just don't get the message. Either their lack of skill is not remediable or they have mental or physical disabilities so severe as to preclude safe practice or their traits of character are so profoundly flawed that they can never safely be trusted.

VII

Rehabilitation must be evaluated on the basis of two very different scales. One is an internal, attitudinal scale and the other is an external objective scale. In other words there must be a state of mind and a state of facts. The state of mind demonstrating rehabilitation is one that has a mature, measured appreciation of the gravity of the misconduct and remorse for the harm caused. The acceptance of responsibility is a necessary prerequisite to establishing rehabilitation.

Petitioner in both his written narrative statement and his testimony at the hearing acknowledges that he alone is responsible for the position he is in. He is the architect of the empty professional house he lives in. A cynical reading of his words might suggest that he still doesn't get it, that he shadowboxes around the ugly truth about himself. This suspicion needs to be addressed in the context of the entire factual background of this case.

Petitioner points to one crucial, irreducible factor in why he is before the Medical Board-himself. In his testimony he admits that he gave the administrative law judge ample

justification for everything she wrote about him. He clearly states that he deserved to have his license revoked. With respect to patient Luebke he states " I bullied her into the operation, I didn't consider her feelings."

Petitioner disagrees with some of the findings of the original proposed decision. Does this mean he fails to accept responsibility? Hardly. He clearly admits his awareness that his rehabilitation "package" might look more attractive if he simply admitted each and every wrong found by the trial judge. A sociopath or one with a personality disorder would have no hesitation saying exactly what the formula words were. Petitioner didn't say all the formula words. But what he did say was what mattered. To suggest that he hasn't accepted responsibility because of the choice of words is to characterize him as cunning and stupid at the same time. Dr. Elam may be many things but he isn't stupid and whatever cunning he has was no match for the truth.

He said he was an arrogant big shot who felt at the time more important than the petty action brought by the Medical Board. He was insulted by any suggestion his conduct should be censured. He testified that at the time of the original trial he considered it his absolute right to practice medicine, his right to do whatever he wished because of his superior knowledge.

Only in losing it did petitioner begin to appreciate what he had. He testified to the lifelong dream of being a physician, to the seduction of fame and wealth and to ignoring and foolishly abandoning the principles of his profession. He testified to being ashamed of his conduct, of deserving what he got, and clearly acknowledged that Judge Chapman's view of his credibility was very understandable.

The ALJ has had the opportunity to assess the credibility of the petitioner while he testified and to correlate his answers with the entire written record available. The ALJ has also had the opportunity to evaluate petitioner's demeanor during the hearing both on direct examination and also on cross examination. No one has the special intuitive gift to assess and evaluate another person's heart. What we do have is the ability to judge words against actions to see if they are consistent. Petitioner's behavior during the hearing was consistent with his words. He had a perspective few of us (thankfully) have. He went from the penthouse to the basement without any intermediate stops. He was shamed and humbled and this humility was honestly expressed.

The weight of the evidence supports a finding that petitioner has the requisite state of mind that would justify consideration of re-licensure.

VIII

To qualify for re-licensure petitioner must show a state of facts as well. He must show a state of facts demonstrated by a course of conduct that convinces and assures the Board that the public would be safe in granting re-licensure. Petitioner must show a track record of reliable, responsible and consistently appropriate conduct.

Since 1990 petitioner:

1. is not on criminal probation or parole.
2. is not charged in any pending criminal action
3. has not been convicted of any criminal offense
4. has not been charged or disciplined by any medical board
5. has not been disciplined by any hospital as to staff privileges
6. has not had any civil malpractice claims filed against him
7. is not addicted or habituated to alcohol or drugs
8. has not been hospitalized for alcohol or drug problems or for mental illness.

Petitioner's personal actions since he ceased practice are important yardsticks by which to judge his rehabilitative efforts. He wrote in his narrative statement to the Board, "In partnership with my wife, I have embarked on a wonderful journey of helping children, both at the elementary schools and in extracurricular activities. My wife and I have raised money for out children's school, we have helped with school programs, and I have participated in the YMCA Indian Guide and Indian Princesses programs, taking youngsters on field trips and camping trips." Testimonial and documentary evidence in the record supports this statement. This supporting evidence is consistent with a changed perception of life and a reordering of priorities. Petitioner testified that he is, more than anything, a housewife doing homework with his children, and coaching their soccer teams. He admits to not even knowing what family life was in 1990 when his license was revoked. Petitioner presented convincing evidence that his lifestyle change is far more than cosmetic. He deeply regrets what he lost of family life through neglect and has taken consistent and long term steps to remedy this.

Petitioner also began an extended course of therapy with Ferris N. Pitts, Jr., M.D., a psychiatrist in Pasadena,

California. He sought Dr. Pitts out to deal with the tremendous reactive depression that he experienced following the revocation of his license. Dr. Pitts confirms in his written statement under penalty of perjury dated 9 October 1995 that petitioner has exhibited a remarkable turnabout from the time of his first visit in 1992 to the present. Dr. Pitts confirms that this turnaround occurred when petitioner finally stopped blaming others and began to accept responsibility for his behaviors.

Petitioner has also worked in the last five years as a consultant to a cosmetics company and has also worked on trying to develop various products such as an air purification system for those with allergies and a special self capping syringe for use with HIV positive patients.

Petitioner has taken in the last two years 140 CME credits and has spent the last two years observing other colleagues performing various surgeries. It is clear that he has made good faith efforts to remain current with his specialty, although watching others and reading medical journals is not the same as practicing medicine.

Petitioner has established a track record of consistent and appropriate behavior in the last five years that correlates with the opinion of Dr. Pitts regarding the personal transformation that has taken place. He has taken those personal steps within his power to prove to the Board and the people of the State of California that he can be trusted.

IX

Petitioner has made a persuasive showing of a personal transformation, not to someone without fault and imperfection but to someone with the necessary insight to recognize that he alone bears responsibility for the loss of his license. As he wrote in his narrative statement to the Board at page 4, "My psychiatric treatment has helped me to understand my need for approval, my arrogance to serve that need, and my character defects of both self-will and self-indulgence. I have sought through both psychotherapy and through my own spiritual journey to rid myself of these character defects."

Petitioner has made the most substantial part of his rehabilitative journey already. However, Business and Professions Code section 2307 requires the ALJ to impose any terms and conditions deemed necessary. Section 2307 is silent on the purpose for the terms and conditions. However, Section 2229 make it very clear that the ALJ should impose any terms or conditions deemed necessary either to protect the public and/or assist the physician in terms of a successful transition to unrestricted practice. The terms contained in the Order, below, are designed to insure, to the fullest extent possible, that

petitioners transformation is full and complete. The taking of an ethics course is important although rehabilitation is far more personal than completion of any one course. The record is not completely clear but petitioner may have completed an ethics course shortly after the hearing of October 16, 1995. If that is so that should satisfy this requirement.

Petitioner should also have a monitor with regard to any insurance billings his office does. This involves getting a second opinion to insure that proper insurance billing is done. An oral or written clinical exam is not necessary in this case. Petitioner's problem was never competence, it was judgment.

Although testimonial letters from social acquaintances, business associates or other physicians are of limited value, those submitted in this case are valuable to show a man who was stripped of the most important thing in his life and has learned the right lesson from it. The letters and the testimony of those at the hearing paint a picture of a very gifted person who finally found the missing link to his wholeness, his humility.

DETERMINATION OF ISSUES

I

Cause was established pursuant to Business and Professions Code section 2307 to grant petitioner's request for reinstatement of revoked certificate, by reason of Findings of Fact II through IX. However, the following terms and conditions are deemed necessary to protect the public and assist the physician through his transition to unrestricted practice.

ORDER

I

The petition of Michael Elam for reinstatement of his Physician and Surgeon's Certificate is granted subject to the following terms and conditions.

1. Petitioner shall be on probation for a period of 24 months.
2. Within 60 days of the effective date of this decision, petitioner shall submit to the Division for its approval a course in Ethics which he shall successfully complete before the end of his first six months of probation.
3. Within 30 days of the effective date of this decision, petitioner shall present to the Division evidence that he has met the Continuing Medical

Education requirements for relicensure and, if he has not done so, he shall take and successfully complete the necessary CME courses within the first year of his probation

4. Within 15 days of petitioner's resumption of the practice of medicine, he shall submit to the Division for its prior approval a plan of practice in which his billing procedures shall be monitored by another physician in petitioner's field of practice, who shall provide periodic reports to the Division. The monitoring shall relate to petitioner's record keeping and billing procedures and practices.

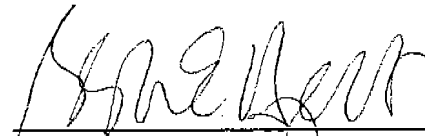
If the monitor resigns or is no longer available, petitioner shall, within 15 days, move to have a new monitor appointed, through nomination by petitioner and approval by the Division.

5. Petitioner shall obey all federal, state and local laws, all rules governing the practice of medicine in California, and remain in full compliance with any court ordered criminal probation, payments and other orders.
6. Petitioner shall submit quarterly declarations under penalty of perjury on forms provided by the Decision, stating whether there has been compliance with all the conditions of probation.
7. Petitioner shall comply with the Division's probation surveillance program. Petitioner shall, at all times, keep the Division informed of his address of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstance shall a post office box serve as an address of record. Petitioner shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) days.
8. Petitioner shall appear in person for interviews with the Division, its designee or its designated physicians upon request at various intervals and with reasonable notice.
9. In the event petitioner should leave California to reside or to practice outside the State or for any

reason should petitioner stop practicing medicine in California, petitioner shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which petitioner is not engaging in any of the activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the Division or its designee shall be considered as time spent in the practice of medicine. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary period.

10. Upon successful completion of probation, petitioner's certificate shall be fully restored.
11. If petitioner violates probation in any respect, the Division, after giving petitioner notice and the opportunity to be heard, may revoke probation and impose discipline. If an accusation or petition to revoke probation is filed against petitioner during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.
12. Following the effective date of this decision, if petitioner ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, petitioner may voluntarily surrender his certificate to the Board. The Division reserves the right to evaluate the petitioner's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, petitioner will no longer be subject to the terms and conditions of probation.

Dated: November 16, 1995



STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings